1997

Rebekah R. Bohman v. Bradford K. Bohman : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REBEKAH R. BOHMAN,	)	
Plaintiff/Appellee,	)	Case No. 970532-CA
vs.	)	
BRADFORD K. BOHMAN,	)	Priority No. 15
Defendant/Appellant.	)	

REPLY BRIEF OF APPELLANT BRADFORD K. BOHMAN

Appeal from Decree of Divorce Entered by the
Second Judicial Court of Weber County, State of Utah
Honorable Michael D. Lyon

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Response to Appellee's Statement of the Case

This statement of the case set forth in the brief filed by plaintiff/appellee Rebekah R. Bohman (hereinafter Rebekah) contains a number of inferences and distortions of fact not justified by the evidence. For that reason defendant/appellant Bradford K. Bohman (hereinafter Brad) submits this response to the statement of the case included in Rebekah's brief.

In her statement of the case, Rebekah suggests that Brad's efforts to clarify the court's ruling were somehow improper. Further, she suggests that Brad's objections to the proposed findings of fact, conclusions of law, and decree, which were drafted by her counsel, were also improper, and that Brad should not have "objected as to the division of the retirement funds." However, all of these proceedings were necessary to clarify the court's ruling. The trial judge indicated that he was glad that Brad had moved to clarify visitation. R. at 1321. The findings of fact, conclusions of law, and decree drafted by Rebekah's counsel simply did not accurately reflect the court's ruling and even contained typographical errors that Brad's counsel could not persuade Rebekah's counsel to change. R. at 1327, Objection No. 37, and Plaintiff's Response, R. at 1342. Rebekah's counsel recognized that some objections were well taken. R. at 1338-39.

In fact, the court did not rule on some major issues until the hearings on the objections. For example, in its initial ruling on June 14, 1996, the court did not rule on Brad's claim that he owed $77,098 to BB Ranchers. Thus, Brad was required to file an objection to the proposed findings, conclusions, and decree. Objections to Proposed Findings of Fact, Conclusions of Law, No. 35. R. at 1329. Since the court had not specified the distribution of all the assets, both parties submitted proposed distributions, including submissions as to division of the retirement accounts. Plaintiff's Submission Regarding Division of Retirement Funds, R. at 1432-38. Defendant's Submission Regarding Division of Retirement Funds, R. at 1415-31. The court then issued a written ruling. R. at 1459-60, Appendix A. The court did not grant additional attorney's fees to Rebekah, because Brad submitted evidence indicating that Rebekah had more liquid assets and more cash flow available to her than he did. R. at 1528-29, Appendix B.

Rebekah also mentions that Brad has filed a petition to modify. However, she attempts to mislead the court by indicating that the basis for the petition to modify is the assertion that income should be imputed to her. In fact, the primary basis for the petition to modify is the fact that Rebekah is now living with her boyfriend, David Garside, and alimony should be terminated because she is cohabiting. R. at 1619.

Response to Statement of Facts

Rebekah also attempts to suggest that Brad should be condemned because he did not seek custody of Angi, her daughter by a previous marriage whom Brad had adopted. For obvious reasons, Brad did not have the same kind of relationship with this child, who was 7 years old at the time of the marriage to Rebekah, that he had with his natural children, whom he had lived with all their lives. He did not seek custody of Angi because he did not feel it was in her best interest and because he respected her wishes to live with her mother. Moreover, Angi was much closer in age to Rebekah's older children who lived with her on and off during the marriage and after the parties' separation.

Rebekah did admit in her testimony and to the evaluator that she sought to reconcile with Brad because she did not want to share custody of the parties' two younger children. R. at 606-7, Custody Evaluation at 20.

Brad also disputes the assertion that Rebekah did not work outside the home because she was caring for the children and Brad's needs. In fact, from Brad's perspective, Rebekah was not in the home during the last several years of the marriage, but rather shopping, playing tennis, and engaging in entertainment and recreation. At least in part, she did not seek employment during the separation because of her desire to travel with boyfriends and pursue recreation. There was no evidence as to the cost of childcare if she were to return to work. Also, Rebekah fails to mention the fact that she quit employment before the children were born, purportedly so that she could return to college.

Facts Pertaining To Custody

The primary reason the evaluator recommended that physical custody of the parties' children be awarded to Rebekah was to preserve the status quo. Although he mentioned keeping the family intact, he did not interview Rebekah's four older children. No determination was made whether the three older children would continue to live in the home. In fact, the evidence showed that the three older children had moved in and out of the home. R. at 593-99.

Rebekah also disputes the claim that she drank to excess. However, she ignores the fact that the court made a specific finding of fact indicating that she had a drinking problem. Finding of Fact No. 14, R. at 1534. Her own mother testified that she had concerns about Rebekah's drinking. R. at 585.

The custody evaluator also ignored all the problems suffered by Rebekah's older children. There was extensive testimony about Cami's truancy and the fact that she had been truant for months before Rebekah even noticed. R. at 628 and 646. The custody evaluator ignored the out-of-wedlock child, Cami's legal problems, Rebekah's desire to have her friend

Debbie adopt the out-of-wedlock child, and a host of other issues pertaining to the older children.

Response to Facts Concerning the Parties

Rebekah argues that she testified that the parties had a standard of living that required them to spend $16,000 per month. Under cross-examination, she admitted that she had no idea what the parties were spending. R. at 558. Given Brad's net income, and the fact that the parties had accumulated substantial assets in savings during their marriage, it would have been impossible for them to have spent $16,000 per month. In fact, as Brad testified, the $16,000 figure was part of a worst case scenario prepared for Brad by a financial advisor in an effort to persuade Rebekah to curb her spending.

The trial court recognized Rebekah's propensity to overspend, finding that "plaintiff is a profligate spender and that that was part of the problem in the parties' marriage. Plaintiff's extravagant spending caused the court some real concerns about plaintiff's stability and her ability to manage to stay on a budget where things are going to be somewhat limited following this marriage." Finding of Fact No. 15, R. at 1534.

I. THE TRIAL COURT'S FINDINGS OF FACT DO NOT SUPPORT ITS AWARD OF CUSTODY TO REBEKAH BOHMAN.

A. Rebekah Bohman has not Cited Findings of Fact that Support the Trial Court's Decision.

In his initial brief, Brad argued that the trial court's findings of fact were not adequate to support its award of custody of the parties' two natural children to Rebekah. In her brief, Rebekah cites extensively from the Supreme Court's decision in *Tucker v. Tucker,* 910 P.2d 1209 (Utah 1996). She suggests that *Tucker* overruled *Smith v. Smith,* 726 P.2d 423 (Utah 1986), which requires that the trial court set forth in its findings of fact the basic facts which show why one parent is the better person to care for the child. However, *Tucker* did not overrule *Smith*, indeed, the court in *Tucker* cited *Smith.*

In *Tucker,* the Supreme Court in no way limited its prior rulings, nor those of the Court of Appeals, concerning the necessity for adequate findings of fact in a custody case. In fact, in citing *Smith v. Smith,* 726 P.2d at 425, the Supreme Court said: "This court has held that a trial court must set forth written findings of fact and conclusions of law which specify the reasons for its custody decision." In *Tucker* the Supreme Court found that the trial court had made findings of fact on numerous factors. The trial court had, in its written findings of fact, indicated that most of these factors favored the father.

Tucker, as decided by the Supreme Court, does stand for the proposition that a temporary custody order should not become outcome determinative. As the Supreme Court said in *Tucker,* "a temporary custody order should not be given the weight of a permanent order."

Rebekah's lengthy citations to *Tucker* simply do not meet the issue raised by Brad—whether the trial court made adequate findings to support its decision with respect to custody. In this case, more of the trial court's findings were favorable to Brad than to Rebekah. The trial court did not explain how the findings of Rebekah that are critical may be reconciled with its award of custody.

In her brief, Rebekah emphasizes the custody evaluation. A fair reading of that evaluation clearly shows, however, that the basis for the recommendation that the children live primarily with their mother was the temporary custody order and the fact that Rebekah did not work outside the home. Because Rebekah was not employed, the custody evaluator made the assumption that she was closer to the children and had been their primary caretaker. The custody evaluator discounted Rebekah's drinking problem, her "dependency issues," the many problems experienced by her older children (and in fact did not even interview those children), and completely ignored her need to return to employment or training. Neither the court nor the custody evaluator explained how Rebekah could continue to provide personal care for the children and provide for herself financially in the future. In five years or sooner, Rebekah will not receive alimony and her child support will be substantially reduced. If she

waits until her alimony ends to re-enter the work force, it will be impossible for her to support herself. As the court noted, she should begin her education or return to work much sooner than five years. Finding of Fact No. 10, R. at 1532-33.

None of the trial court's findings about Brad were negative. The trial court did not reconcile its negative findings about Rebekah with its award of custody to her.

B. Rebekah Bohman has not shown that the Evidence Supports the Trial Court's Findings of Fact.

Rebekah argues that Brad has not marshaled the evidence. She claims that she will marshal the evidence for Brad. She mentions testimony by the parties' accountant, by their dentist, and by two of Rebekah's friends, Kathy Field and Cindy Maw. Obviously, the accountant did not testify concerning custody. It is difficult to understand why Rebekah would argue that his testimony ought to be marshaled to support the trial court's findings. Kathy Field, one of Rebekah's custody witnesses, based her opinion that Rebekah was a good mother upon her seeing Rebekah at the grocery store with her children less than once a month. The testimony of Kathy Field that Rebekah relies on in support of the trial court's decision to award her custody is that Rebekah, when seen at the grocery store, acts "like a mother." R. at 941-43. This hardly requires Brad to marshal any evidence to dispute it. Rebekah's other friend, Shirley Ann Morgan, testified that she and Rebekah and her friend Debbie, who committed suicide, would go drinking as a group. When asked how often that occurred in the last four years, Ms. Morgan testified "a lot." R. at 935, l. 12. Rebekah had also reported to Ms. Morgan about three different men that she had dated in the time since her separation from Brad—Steven Hand, Hal Hintze, and David Garside. R. at 936.

(1) The evidence does not support a finding that Rebekah was the primary caretaker of the children during the last several years of their lives.

The court and the evaluator seemed to assume that, because Rebekah did not work outside the home, she was the primary caretaker of the children. However, the housekeeper,

Arlene Walker, and Brad testified that Brad began to spend much more time with the boys as they got older. Mr. Johnson, the custody evaluator, had no way of knowing how much time Rebekah was spending with the children in the years prior to the separation except for the reports he received from Rebekah and Brad.

It is always difficult for a finder of fact to resolve disputed testimony of the parties concerning who is the primary caretaker of the children. The two parties, who are in the best position to know, obviously have different perspectives and different views of the facts. For that reason, Brad attempted to offer some objective evidence of Rebekah's absences from the home, including her cellular telephone bills. Even though she did not have employment outside the home, she hired Arlene Walker to care for the children two days a week (R. at 577), her older children often cared for the younger children (R. at 579), and Brad also cared for the children.

Rebekah now attempts to argue the fact that Brad's proof that she used her cellular phone extensively at various times, including late at night, does not show she was out of the home. The idea that she would use the cellular phone while she was in the home is ludicrous. The cellular phone bills clearly indicated extensive absences from the home.

Rebekah also claims that the testimony of her mother, Beth Delacruz, shows that Rebekah made her children her top priority. However, the citation to the record provided by Rebekah is to testimony that Ms. Delacruz had been concerned about Rebekah's supervision of her older children prior to her marriage to Brad. R. at 590-92. Shirley Morgan, another witness whose testimony Rebekah cites, did not testify that the children's needs were first and foremost for Rebekah. In fact, she testified that she and Rebekah went drinking together "a lot" in the last four years. Presumably the children were not present on these occasions. R. at 935. Rebekah also cites the testimony of Brad's mother, but distorts that as well. Brad's mother testified that although Rebekah had been a good mother to the boys in their early years, later she was not in the home very often. R. at 858, ll. 20-21. Brad's mother also testified that Rebekah was a steady drinker. R. at 852. Another witness cited by Rebekah,

Cindy Maw, testified that she and Rebekah went golfing, out to dinner, to baseball games, and shopping together. Cindy Maw did not have children of her own. Cindy Maw and Rebekah have been to clubs drinking together. R. at 903.

In the spring of 1995, when Rebekah and Brad had reconciled briefly, she was out of the home taking real estate classes or simply going out for the evening for a period of several weeks. R. at 907-8.

Rebekah also argues that the assertion that she traveled with her boyfriends is misleading. However, she did travel extensively with her boyfriends. R. at 617. By her own testimony, during the separation she went to Bear Lake for weekends fifteen times, to Mexico twice, to New York, Jackson Hole, Yellowstone, Mesquite, Hawaii, Sun Valley and San Diego. R. at 617.

(2) The evidence does not show that the parties were equal in promoting visitation.

Rebekah consistently has taken the position throughout these proceedings that Brad is controlling. The basis for this seems to be Brad's desire to maintain a meaningful relationship with his children. The parties both testified that they have had difficult confrontations. Brad testified that Rebekah had hit him on one occasion when he was dropping off the children from visitation.

Rebekah also testified that Brad was critical of her. However, she ignores the fact that she was consistently critical of Brad. In fact, her statement that he is controlling is certainly a critical one. Rebekah also testified that doctors are controlling, and for that reason she had decided not to work in the medical field. R. at 614. Dr. Hales, the parties' dentist, with whom Rebekah had a personal relationship, is hardly a person qualified to testify about Brad's personality characteristics. Although Mr. Johnson, the custody evaluator, said he had concerns about control issues, that testimony was based on the fact that Brad disputed his custody evaluation. R. at 701. Mr. Johnson was also offended that he had been served with a subpoena to obtain the documents backing up the custody evaluation. R. at 701-2. Mr.

Johnson was obviously offended that Brad did not accept his recommendation. Only at trial did he realize that Rebekah had also rejected his recommendation. R. at 702.

Brad's uncontroverted testimony was that Rebekah consistently created obstacles to his visitation with the children. With respect to Angi, Rebekah would make plans to do things with Angi during the time that she should otherwise have been visiting with her father. R. at 776-78. With respect to visitation with the two younger boys, Brad's uncontroverted testimony was that Rebekah had, on several occasions, left town with the children during what would otherwise have been Brad's visitation time without notice to Brad. R. at 778-79. Brad also testified that Rebekah had not provided telephone numbers when she traveled with the children out of town. R. at 779.

Despite the court's order that Brad be allowed to provide care for the children when Rebekah was going to be going out for the evening or travelling, Rebekah did not allow Brad to do so. R. at 781. In addition, Brad did all of the transportation for visitation. R. at 782.

(3) The evidence did not support the finding that Rebekah had greater flexibility to provide personal care for the children.

Obviously, the court based this finding on the fact that Rebekah was unemployed. However, as has previously been discussed, the court recognized the need for Rebekah to return to employment or education. The uncontradicted evidence showed that Brad's schedule allowed him to be home during the week a great deal and that he had the ability to provide backup care for the children when he was on call in his position as an anesthesiologist.

(4) The evidence did not support the finding that Rebekah can provide adequately for the children financially.

As noted, the only evidence supporting this finding of the fact is the court's award of alimony of $4,225 per month and child support of $3,000 per month. There was extensive evidence that Rebekah continued to go into debt even though she was receiving temporary support in a high amount. The evidence clearly showed that Rebekah had failed to make

mortgage payments on time, and she testified that she had difficulty making ends meet. The court's finding that Rebekah is a profligate spender and that the court was concerned about her stability and ability to manage money contradicted its finding that she would be able to provide adequately for the children financially in the future.

(5) The evidence does not support a finding that the parties are equal in moral character.

In her brief, Rebekah characterizes the evidence that Brad presented as to her background as a "smear campaign." Unfortunately, in a contested custody proceeding, both parties are required to call attention to the negative aspects of the other party's background and character. The negative information about Rebekah would not be material except as it reveals her ability to parent the children.

Rebekah's own testimony indicated that she had taken her four older children to live with her in the home of her third husband knowing that he was abusive and an alcoholic. R. at 602. After she left that relationship and began to date Brad, she sent her three older children to live with their father. These are facts that bear directly on her ability to parent the children whose custody was at issue in these proceedings.

Attempting to divert attention from these facts, Rebekah indicates Brad was found to be "intense" by his therapist. This is hardly relevant to his moral character.

Of even greater concern was the difference that the evidence showed in the two parties' values. The history of Rebekah's three older children indicates that they had a great deal of trouble with their academic programs in high school. Rebekah's own testimony indicated that the values on which she placed the most emphasis had to do with appearance, rather than substance. R. at 532.

The trial court seemingly ignored all the evidence concerning Rebekah's history and the impact that history had had on her older children. Rebekah's only defense to this is the repeated refrain that Brad is controlling. In her brief, Rebekah has not offered any evidence to support the finding that the parties are of equal moral character.

Brad has marshaled the evidence to demonstrate that it is insufficient to support the trial court's findings on these issues. For that reason, the Court of Appeals should find that the evidence does not support the trial court's findings of fact.

II. THE TRIAL COURT'S FINDINGS OF FACT CONCERNING VISITATION ARE INADEQUATE.

In her brief, Rebekah argues that the trial court's award of visitation was proper and that Brad's desire to have more visitation is simply an example of his controlling personality.

That argument simply does not deal with the issues. Brad agrees with the statement of law set forth in Rebekah's brief that the trial court must give the highest priority to the welfare of the children in determining visitation rights. *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992). However, in this case, the court more or less accepted Rebekah's suggestions with respect to visitation without taking into account Brad's better ability to facilitate the children's education, the extreme flexibility of Brad's schedule, the recommendation of the custody evaluator that the temporary visitation schedule continue, or the evaluator's recommendation that there should be flexibility to allow for continuity of visitation.

The trial court failed to tie its factual findings to the visitation schedule it ordered. The court did not explain why its acceptance of the visitation schedule Rebekah suggested would promote the children's welfare. For that reason, its findings on this issue are inadequate.

III. THE TRIAL COURT SHOULD HAVE IMPUTED INCOME TO REBEKAH.

In her brief, Rebekah argues that the trial court should not impute income to her because the issue was not raised at trial. However, the issue was raised and argued at trial. Moreover, UTAH CODE ANN. § 78-45-7.5(7)(c) (Supp. 1997), requires that the court impute income to a parent to at least the federal minimum wage level for a forty hour work week. Brad was not required to present evidence in order for the court to have that legal duty.

Rebekah also argued that the court found that it would not be economical for her to return to work because of the cost of clothing and daycare. However, in the very same sentence, the court found that "plaintiff should obtain employment or go to school." Finding of Fact No. 29, R. at 1542.

In this case, Rebekah was already using surrogate care for the children. (Brad was also available to provide care.) The court made no specific findings as to the actual cost of childcare for Rebekah, but did accept Rebekah's statement of monthly living expenses for purposes of calculating alimony and child support which included $250 per month for childcare and $50 per month for preschool. The court also ignored the fact that Braxton was age 6, and Bryson was age 5 at the time of trial. Braxton was already in kindergarten and Bryson was scheduled to begin kindergarten in the fall of the year of trial, 1996, not two or three years in the future. Rebekah also included in her budget a monthly clothing expense of $350, and a drying cleaning expense of $60. It is difficult to imagine that those items would necessarily increase if she were employed.

The court clearly understood the fact that Rebekah needed to return to work in order to develop an ability to support herself prior to the termination of her alimony. Despite making those findings, however, the court imputed no income to her. Under UTAH CODE ANN. 78-45-7.5(7)(c) (Supp. 1997), the court was required to do so.

IV. THE TRIAL COURT DID NOT MAKE ADEQUATE FINDINGS TO SUPPORT ITS AWARD OF CHILD SUPPORT.

In this case the court simply awarded $1,000 per month per child as child support without any evidentiary basis. The court entered no findings whatsoever to support that award.

Rebekah argues that Brad stipulated to the amount of child support. However, she cannot point to a place in the record where this alleged stipulation took place. Rather, she argues that because she asked for $1,500 per month in temporary child support and received

$1,000 per month per child as temporary child support, Brad had somehow agreed to that amount.

Brad argued vigorously against Rebekah's receiving the amount of temporary alimony and child support she sought. At trial, he was seeking custody of his two children, Braxton and Bryson. Therefore, his argument was as to the amount of child support he should pay for Angi, the child whom he had adopted and who would presumably continue to live with Rebekah. Brad's counsel argued as follows:

> Our suggestion would be that if custody of the boys is awarded to Brad, that child support for Angi be set in accordance with the guidelines at the highest level, to take into account both the fact that his income is above the guidelines, but not require payment of child support from Rebekah to him.

R. at 1141.

Brad's position was that if custody of the three children were to be awarded to Rebekah, child support should be set at the highest amount for three children set forth in the table or $1,808. Utah law requires an award of at least that amount, but requires additional findings of fact if an award is to be made in excess of that amount. *Ball v. Peterson*, 912 P.2d 1006 (Utah App. 1996). In *Ball*, the trial court had arrived at its monthly child support award through linear extrapolation from the child support table. The trial court in *Ball* had provided no findings to explain how it arrived at the amount of child support. The Court of Appeals said that a trial court must consider and make specific findings on all "appropriate and just" factors in awarding such child support.

In this case, the $1,000 per month per child figure was chosen arbitrarily. The fact that $1,000 per month per child was awarded as temporary child support has no bearing on the trial court's duty to make factual findings. Brad never agreed that $1,000 per month per child was a proper amount of child support. It was not his burden to present evidence as to a proposed child support award over the guidelines since he had proposed child support in accordance with the guidelines.

Rebekah also argues that the factual findings in this case are adequate because the court made findings with respect to the parties' incomes. The trial court in *Ball* had also made findings as to the parties' incomes. Although Rebekah testified that she had $7,258 per month in expenses, she presented no breakdown as to which part of those expenses were for her and which for the children. The trial court did not make any findings as to the children's needs and simply awarded child support and alimony so that the total came to the amount Rebekah sought. Without factual findings supporting the award in excess of the guideline amounts, the trial court's child support award cannot stand.

V. THE TRIAL COURT DID NOT MAKE ADEQUATE FINDINGS OF FACT TO SUPPORT ITS ALIMONY AWARD.

The parties agree on the legal standards for awarding alimony. The parties disagree, however, about whether the trial court in this case adequately examined the three necessary factors that it must examine in determining alimony.

A. The Trial Court did not make Adequate Findings of Fact as to Rebekah's Needs.

Rebekah testified at trial that she did not know how much the parties were spending prior to their separation (R. at 558), and that she had no idea of what their household expenses had been. R. at 558, ll. 21-23. Rebekah's testimony made it clear that the expenses she claimed were not actual expenses but simply estimates. R. at 566. Some of the expenses were obviously inflated. For example, food and household supplies for one woman and three children was $1,000. Rebekah wasn't able to identify anything that was included in her claimed miscellaneous and incidentals of $100. R. at 565-66.

The court did not critically examine any of Rebekah's claimed expenses, instead it simply awarded her the full amount of alimony and child support she claimed to need.

Rebekah also argues that Brad agreed not to argue that her expenses related to the house were not realistic. However, the actual stipulation, as reflected in Finding of Fact No. 31, was that Brad would not argue that a change of circumstances had taken place if Rebekah

chose to purchase a less expensive home. R. at 1543. Of course, the record reflects that Rebekah did not purchase a less expensive home. R. at 1518.

B. The Trial Court did not Make Adequate Findings as to Brad's Ability to pay or Rebekah's Ability to Contribute to Her Own Support.

As noted in Brad's initial brief, although the trial court found that his annual gross income was $278,000, it made no finding as to his net income. Rebekah relies on the testimony of her accountant to establish Brad's net income. However, the accountant found that Brad's net expendable income would be $7,843, not $8,400 as claimed in Rebekah's brief, if Rebekah received the alimony she sought. The trial court found that Brad had reasonable living expenses of between $8,300 to $8,900 per month. Finding of Fact No. 30, R. at 1542. Obviously, Brad could not meet living expenses of $8,300-$8,900 per month on $7,843, the amount of net expendable monthly income, the accountant estimated. Appendix to Appellee's brief at 41. Thus, the trial court either ignored Mr. Passey's testimony and did not make any finding at all as to Brad's expendable net monthly income, or determined that Rebekah should be awarded sufficient alimony and child support to meet all of her claimed monthly expenses and that Brad should have a shortfall in meeting his reasonable monthly living expenses of between $457 and $1,057.

Without findings of fact on these issues, it is impossible to determine what figures the court actually used and what the court's reasoning was with respect to its alimony award. By failing to make adequate findings of fact on this issue the court abused its discretion. *Schaumberg v. Schaumberg*, 875 P.2d 598 (Utah App. 1994).

C. The Trial Court Did Not Make Adequate Findings of Fact as to the Duration of Alimony.

Rebekah argues that the trial court had no duty to make a finding of fact as to its reasoning for the duration of alimony. At the same time, Rebekah argues that the trial court implicitly made such findings of fact.

The record reflected that Rebekah had made no effort during the parties' separation to obtain employment or education. In fact, she had not even settled on a career direction. When she went to college during the relationship with Brad, she wanted to become a nurse. R. at 614. She changed her mind about that profession because she found doctors to be controlling. Id. at 614. When she answered interrogatories, she indicated she wanted to get a master's degree in business. Id. at ll. 18-20. Rebekah then decided she wanted to pursue an eighteen-month degree in sport's medicine. She hadn't made any decisions about that. R. at 615. She had also taken real estate classes and then dropped out of that process. R. at 615.

Rebekah argues that Brad should have presented evidence as to the duration of Rebekah's alimony. However, since Rebekah was the party seeking alimony, she had the burden to show her need and the appropriate duration. The trial court made no findings as to duration and simply accepted Rebekah's suggestion that she receive alimony for a period of five years.

VI. THE TRIAL COURT ERRED IN FINDING THAT CERTAIN ITEMS OF BRAD'S PREMARITAL PROPERTY HAD BEEN CONSUMED DURING THE MARRIAGE.

In her brief, Rebekah first argues that Rebekah should have received credit for premarital assets which she had sold or disposed of prior to the marriage. This argument distorts the evidence. Rebekah testified that the Porsche she owned prior to the marriage was sold before the marriage. R. at 622. Thus, the Porsche was not Rebekah's premarital property, since, she did not own it at the time of the marriage to Brad. Likewise, the couch that Rebekah claimed as premarital property was sold to her mother. Most of the other items for which she did not receive credit as premarital property she still has in her possession. R. at 623. The issues raised by Rebekah as to her premarital property seem to be an attempt to divert attention from the legitimate issues raised by Brad.

Neither the Supreme Court nor the Court of Appeals has directly addressed the issue of how to treat cash held by a party prior to marriage. In this case, Brad had cash at the

beginning of the marriage and there was more cash at the end of the marriage. The trial court's finding that the cash had been consumed is not logical.

A. The Fidelity Investment Account.

At the time of his marriage to Rebekah, Brad had $50,529 in his Fidelity Investment USA account X29002453. At the time of the divorce the assets held in Fidelity Investment USA account X29002453 totaled more than $180,000. (Defendant's Exhibit 44a). Thus, the account had not changed form. Rebekah's name never appeared on the account. Brad was the person in whose name the account was held and who could sign checks. R. at 998.

Because Brad had added to the account during the marriage, he did not claim the entire account was premarital property. Instead, he sought a credit for the amount held in the account at the time of the marriage. The cash that existed in the Fidelity Investment account in September of 1989 had not been consumed. More funds had been added to the account. Thus, the trial court's conclusion that this premarital asset had been consumed simply was not supported by the evidence.

B. The Key Bank Checking Account.

At the time of the marriage, Brad had $21,286 in his account with Key Bank. (Defendant's Exhibit 44a). The money from this account was transferred to the First Security Bank checking account. At the time of the divorce, the court found that Brad had $23,687 in this First Security account. Thus, although the same dollars were not in the account at the time of the marriage, the cash in the account had not been consumed and should have been awarded to Brad as premarital property.

C. The 1986 Jeep Cherokee.

Brad's 1986 Jeep Cherokee had been sold during the marriage and the proceeds deposited into the parties' account. This testimony was not disputed. Rebekah suggests that Brad should have offered additional evidence as to what happened to these monies. It is difficult to determine why that should be the case when there was no dispute. Obviously, the

proceeds of the sale of the Jeep Cherokee augmented the marital estate. Had those monies not been added to the marital estate, the marital estate would have been smaller.

Rebekah cites *Willey vs. Willey*, 866 P.2d 547 (Utah App. 1993), for the proposition that premarital property that has been consumed cannot be found to be separate property. The *Willey* case is factually different from the present case. In *Willey*, plaintiff claimed that she should have been awarded the amount of equity she had in a home at the time the parties married. However, when the parties divorced, they had no equity in their home. In fact, when the marital home was sold, the proceeds of the sale were not sufficient to pay the obligations. Thus, the plaintiff's premarital asset had truly been consumed. That is, the equity in the premarital home had been used for the parties' expenses during the marriage. In this case, Brad's premarital assets were not consumed since the size of the marital estate exceeded the size of the premarital estate. For that reason, the trial court should have given him credit for the premarital assets.

D. Rocky Mountain Anesthesiology Account.

In his initial brief, Brad erred in indicating that the trial court had not given him credit for the debt he owed Rocky Mountain Anesthesiology. This was an error on the part of counsel, for which counsel apologizes.

However, the argument that Brad did not present evidence that he had $35,901 in his business account when the parties married is simply wrong. Both parties relied on the statement provided by Brad as an attachment to Exhibit 44a, Exhibit 9. There was no dispute to the authenticity or accuracy of that exhibit. Rebekah does not explain why the accounts receivable of Rocky Mountain Anesthesiologists were a premarital asset for which Brad should receive a premarital credit and the current accounts receivable were a marital asset which should be charged to Brad on the balance sheet, if the $35,901 held in Brad's cash account should not also be credited.

E. Loan to Brad's Brother Brent and Loan to Rebekah.

Rebekah argues that Brad should not have received a credit for the $10,000 he had loaned his brother prior to the marriage that was repaid during the marriage, because the monies went into the parties' joint account and were used for family expenses. Repayment of the loan augmented the marital estate by $10,000. The marital estate had increased in value during the marriage. Accordingly, Brad should have received a credit for the loan.

Likewise, it was Brad's uncontroverted testimony that he had loaned $17,000 to Rebekah prior to the marriage and that the loan had not been repaid. The trial court did not indicate why this amount should not be repaid. In her brief, Rebekah argues that the statute of limitations would have been a defense to this loan. However, the statute does not begin to run until the demand had been made. Further, Rebekah never asserted this statute of limitations as a defense at trial. Brad should have been awarded premarital credits as to both loans.

F. Rebekah's $5,000 Premarital Credit.

The trial court treated Rebekah's claim for premarital credit quite differently from Brad's. Although she originally claimed $16,000 in premarital assets, when the evidence showed that most of those assets had been sold before the marriage, she reduced her claim to $5,000. After trial, the three bedroom sets which comprised the majority of Rebekah's premarital property were appraised. The appraiser estimated the value at $655. The court did not explain why it did not simply return Rebekah's personal property to her or how it arrived at the figure of $5,000 for the premarital property. Accordingly, the trial court erred in giving Rebekah $5,000 credit for her premarital property.

Rebekah argues that the trial court treated her the same way it treated Brad by giving her $5,000 of the $16,000 that she originally requested in premarital credit. However, Rebekah herself amended her request when the evidence did not support it. In fact, the trial court ultimately gave her all of the $5,000 in credit she requested.

VII. THE TRIAL COURT'S FINDINGS CONCERNING THE VALUE OF THE FIRST SECURITY CHECKING ACCOUNT, VAN, AND THE ROSS DRIVE HOME EQUITY ARE INADEQUATE.

As set forth in Brad's original brief, the trial court's findings of fact concerning its property division must be sufficiently detailed to disclose court's reasoning in resolving factual issues. *Walters v. Walters*, 812 P.2d, 64 (Utah. App. 1991). It is Brad's position that the court failed to make sufficient findings as to the valuation of certain personal property.

A. The Trial Court's Findings of Fact Regarding the Value of the Van Were Inadequate.

The trial court accepted the value of the van asserted by Rebekah over the value of the van asserted by Brad, despite the fact that Brad was willing to take the van on his side of the ledger at the higher value. Rebekah asserted the value at a trade-in level, Brad used a retail level. The trial court did not make any findings of fact to support its acceptance of Rebekah's value. In doing so, it erred.

B. The Trial Court Findings of Fact as to Brad's First Security Account Were Inadequate.

Brad's uncontroverted testimony was that the balance in his First Security checking account as of the date of trial was $12,870. However, the court decided to use the last statement balance, despite Brad's uncontroverted testimony that a mistake had been made and an extra amount of $10,816 deposited into the account and later withdrawn.

Because there was no evidence to contradict Brad's testimony, the trial court erred in using the higher figure.

C. Ross Drive Proceeds.

Prior to the marriage, Brad had purchased a house on Ross Drive. The uncontroverted evidence indicated that Rebekah contributed nothing to the down payment on the house, and nothing to the costs of remodeling all of which took place before the marriage.

The Ross Drive home was sold and Brad presents documentary evidence that the net proceeds of the sale were $50,470.

The $40,000 figure the trial court used as a premarital credit apparently came from a loan application Brad had filled out in October of 1989 that showed the value of the house, by Brad's estimate at that time, to be $150,000 and the mortgage to be $110,000. Obviously, these figures were mere estimates. The trial court failed to explain in its findings of fact why it chose to use an estimated figure instead of the actual proceeds of sale. Because it did not make this explanation, its findings of fact were inadequate.

VIII. THE TRIAL COURT ERRED IN APPLYING A FOUR-YEAR STATUTE OF LIMITATIONS TO THE BB RANCHERS' OBLIGATION.

In her brief, Rebekah attempts to reargue her position at trial that the court should not recognize Brad's obligation to BB Ranchers as a martial obligation. However, Rebekah has not cross-appealed and this court is not free to reexamine that issue.

Rebekah also argues that the trial court committed error by finding the BB Ranchers' obligation to be a marital obligation, but not including the accounts receivable of BB Ranchers as a martial asset. No evidence was presented at trial that account receivables existed and Rebekah never took such a position at trial.

In fact, Rebekah did not make her argument as to the effect of the statute of limitations on this obligation at trial. This case was tried in April of 1996. The court issued its original decision on June 14, 1996. However, in its original decision, the court did not rule on the BB Ranchers' obligation. In October of 1996, the court held a hearing on the objections to the proposed findings of fact, conclusions of law and decree. Only then, for the first time, did counsel for Rebekah raise the statute of limitations as a defense to the BB Ranchers' obligation. Transcript of hearing on October 17, 21, 1996, at 76-81, Appendix C.

Because Rebekah has not cross-appealed, the court must assume that this obligation is valid, as the trial court found. Thus, the only issue is the amount of the obligation.

As indicated in Brad's opening brief, the trial court did not identify which statute of limitations it intended to apply. The parties have assumed that the trial court meant to apply UTAH CODE ANN. § 78-12-25 (1996). Although the court made no such finding, nor was any evidence presented that at any defense to the obligation had ever been asserted.

Rebekah argues in her brief that a debt was created each year to BB Ranchers and that at the close of each year, the debt was final, due and payable. No such evidence was adduced at trial. Brad's testimony was that he had a running obligation to BB Ranchers. Under UTAH CODE ANN. § 78-12-25 (1996), an action may be commenced "at any time within four years after the last charge is made or the last payment is received." UTAH CODE ANN. § 78-12-25(1) (1996).

In this situation, the last charge at issue was made at the tax year 1995. Thus, the statute of limitations had not expired for any of the obligation.

The statute of limitations, which was not raised as a defense to this obligation until sometime after trial, does not apply to decrease the obligation to BB Ranchers. In so finding, the trial court erred.

IX. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE WEDDING RING WAS REBEKAH'S PREMARITAL PROPERTY.

In her brief, Rebekah argues for the first time that the wedding ring at issue was given to her before marriage and thus was premarital property. However, there was no evidence that the wedding ring was given to her prior to the marriage. In fact, it is Brad's position that the wedding ring was actually given after the marriage. The trial court apparently assumed that the wedding ring had been given before marriage, but no evidence was presented to this effect.

If Rebekah bases her position with respect to the wedding ring on her contention that it was an item of premarital property, she must point to some evidence in the record that

supports that. In fact, Brad's position was that the wedding ring was actually purchased after the marriage took place was marital property as was the other jewelry.

X. THE TRIAL COURT DID NOT MAKE APPROPRIATE FINDINGS UPON WHICH TO BASE ITS AWARD OF ATTORNEY'S FEES TO REBEKAH.

It is difficult to reconcile the trial court's finding in this case of some need for assistance with Rebekah's attorney's fees, with its findings that she would receive a substantial amount of cash in the property distribution (approximately $192,109), the fact that she had already used $11,500 of marital funds to pay attorney's fees, and the fact that she would receive $7,225 as alimony and child support. R. at 1528-29, Appendix B.

Later in these proceedings, the court found that Brad's ability to pay attorney's fees was not as great as Rebekah's, given the circumstances. Accordingly, the trial court abused its discretion in requiring Brad to pay an additional $5,000 of Rebekah's attorney's fees.

CONCLUSION

Rebekah claims that the record in this case shows Brad's need to control. In fact, her response to most of the legal issues he has raised is that he has a controlling nature. However, it is equally true that Rebekah wished to control the outcome of these proceedings.

Ironically, Rebekah has taken the same position that the custody evaluator took in this case. The custody evaluator came to the conclusion that Brad had control issues because Brad did not agree with his evaluation. The custody evaluator chose to be offended because Brad asked to see the documents backing up the evaluation. Likewise, Rebekah simply accuses Brad of being controlling whenever he does not agree with her position on an issue. In her brief, Rebekah has not demonstrated the trial court made adequate findings of fact on the issues raised on this appeal. She has not explained how the trial court's negative findings of fact may be reconciled with its award of custody to her or why this court should affirm the trial court's failure to deal with important issues, such as the behavior of her older children.

With respect to the financial issues, Rebekah has not explained why this court should sustain the trial court's award of child support without any findings of fact or how the findings of fact pertaining to alimony meet the requirements of case law. Likewise, the trial court's ruling with respect to premarital property and the values of marital property did not have an inadequate basis in its findings of fact.

The record also does not support even a partial award of attorney's fees to Rebekah. She should not be awarded her attorney's fees in connection with this appeal, since the trial court has found that she now has more cash available than Brad does under the awards made by the court.

DATED this 30 day of March, 1998.

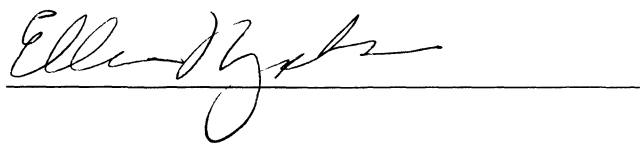
Respectfully submitted,
KRUSE, LANDA & MAYCOCK, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101

By _____
ELLEN MAYCOCK
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to be delivered, by hand, to the following, this 30 day of March, 1998.

B. L. Dart
Sharon L. Donovan
Dart, Adamson & Donovan
310 South Main, Suite 1330
Salt Lake City, Utah 84101



Tab A

IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

REBEKAH R. BOHMAN, Plaintiff, vs. BRADFORD K. BOHMAN, Defendant.	RULING Case No. 944901996

Both parties have submitted memoranda on the proper division of retirements funds. The court apologizes for the delay in deciding this issue but it has been under an oppressive trial schedule that has made it difficult for the court to take earlier action in this case. In addition, the court's decision list contained a clerical error that indicated that the Notice to Submit for Decision had been filed on November 29, 1996. In reality the notice was filed on November 20; thus the court went beyond the 60-day period in which cases should be decided, but it did so inadvertently.

In this case, the court orders that the martial assets between the parties be equalized. The court likely created some confusion when it previously directed that this was to be accomplished through the distribution of retirement funds and for that it apologizes. The court believes that the plaintiff should have sufficient liquidity to get into a home commensurate to the standard of living to which she is accustomed. However, in allocating the assets to achieve this objective, the court is

reluctant to allocate a disproportionate share of the retirement funds to defendant because they are encumbered by tax obligations and potential penalties. It is inappropriate and inequitable in this case to equate pre-tax dollars with post-tax dollars in any such allocation.

The court finds that plaintiff will have sufficient liquid funds to purchase a suitable home and to pay her attorneys' fees if she is awarded the assets as outlined in page 2 of defendant's Response to Plaintiff's Submission Re: Division of Retirement Funds, which include one-half of the Charles Schwab Bohman Family Trust Account and her share of the Fidelity USA investment account. The retirement accounts may therefore be divided equally between the parties.

Dated this 28 day of January, 1997.

Michael D. Lyon, Judge

1/29/97

I am in receipt of plaintiff's request for additional attorneys' fees that arrived by fax yesterday. If Mr. Dart will provide Ms. Maycock with the same documentation, I will consider the request under the procedure of rule 4-501. I also promise to act promptly. Michael Lyon

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of January, 1997, I sent a true and correct copy of the foregoing ruling to counsel as follows:

B.L. Dart
Sharon A. Donovan
Dart, Adamson & Donovan
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101

Ellen Maycock
Pamela S. Nighswonger
Kruse, Landa & Maycock, L.L.C.
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

Deputy Court Clerk

Tab B

IN THE SECOND JUDICIAL DISTRICT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

REBEKAH R. BOHMAN, Plaintiff, vs. BRADFORD K. BOHMAN, Defendant.	RULING Case No. 944900996

APR - 5 1997

SECOND DISTRICT COURT
97 APR 15 PM 12:10

Plaintiff seeks assistance from the defendant to pay her attorneys' fees of $6,572 incurred since the motion for clarification following the parties' divorce trial.

The court awarded to the plaintiff monthly alimony of $4,225. This support, when coupled with the indirect benefit she receives from $3,000 in child support to help pay such things as her mortgage, utilities, and other living expenses, is adequate to meet her financial obligation to her lawyers. Additionally, she has access to ample liquidity from her share of the other assets awarded to her in the marriage. Further, the court does not find any unusual current financial needs not contemplated when the court gave its decision.

On the other hand, defendant, by affidavit, attests to earning only $241,000 in 1996, rather than his historical annual income of $278,000, on which the court predicated its other financial rulings, including the previous award for $16,500 of attorneys' fees. On balance, the plaintiff is now in a much better position to pay the requested fees than the defendant.

Accordingly, plaintiff's request for additional fees is denied.

Dated this 15 day of April, 1997.

Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of April, 1997, I sent a true and correct copy of the foregoing ruling to counsel as follows:

Ellen Maycock
Kruse, Landa & Maycock, LLC
Eighth Floor, Bank One Tower
50 West Broadway
Salt Lake City, Utah 84101-2034

Bert L. Dart
Sharon A. Donovan
Dart, Adamson & Donovan
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101

Deputy Court Clerk

Tab C

EXHIBITS, IF I MAY HAND THOSE TO YOU.

THE COURT: SURE.

MR. DART: WHAT NUMBER?

MS. MAYCOCK: NUMBER 63 --

THE COURT: THANK YOU.

MS. MAYCOCK: -- WAS A LETTER FROM DR. BOHMAN'S BROTHER TALKING ABOUT THE ACCOUNT. AND THEN WHILE WE WERE IN TRIAL IN THIS CASE, THERE WAS SOME DISPUTE ABOUT WHAT THIS OBLIGATION CALCULATION WAS AND WE BOTH PUT OUR ACCOUNTANTS TO WORK ON THAT. AND WHILE MR. DART'S ACCOUNTANT CERTAINLY DID NOT CONCEDE THAT THERE WAS A LEGITIMATE OBLIGATION, HE DID HAVE INPUT INTO THE CALCULATION AND WE HAD ATTACHED THIS CALCULATION TO OUR EXHIBIT 45-A, WHICH WAS THE AMENDED ONE. THIS WAS THE CALCULATION OF WHAT THE OBLIGATION WAS FOR THE YEARS OF THE MARRIAGE. WHAT THIS WAS, YOUR HONOR, TO GIVE YOU THE BACKGROUND, DURING THE MARRIAGE, DR. BOHMAN'S FAMILY AGREED THAT HE COULD TAKE THE TAX CREDITS THAT CAME FROM B.B. RANCHERS TO THE EXCLUSION OF HIS OTHER PARTNERS IN B.B. RANCHERS BECAUSE HE WAS IN A BETTER POSITION TO MAKE USE OF THEM THAN THE OTHER PARTNERS. BUT HIS AGREEMENT WITH B.B. RANCHERS, WITH HIS FAMILY, WAS THAT THESE WOULD ACT AS A LOAN, AND THAT HE WOULD HAVE TO PAY THESE AMOUNTS BACK TO B.B. RANCHERS. OBVIOUSLY, THE PARTIES HAD THE BENEFIT DURING THEIR MARRIAGE OF $66,000 IN FEDERAL TAX CREDITS AND $10,000 IN STATE TAX CREDITS. OBVIOUSLY, IT'S OUR POSITION THAT HAVING

THOSE TAX CREDITS MADE THEM -- MADE THE MARITAL ESTATE GROW BECAUSE OTHERWISE THEY WOULD HAVE PAID THAT, THOSE AMOUNTS TO THE GOVERNMENT. DR. BOHMAN'S POSITION IS HE'S GOT TO PAY THESE AMOUNTS BACK TO HIS FAMILY. HE PROBABLY SHOULD HAVE PAID THEM ALREADY BUT DID NOT DO SO BECAUSE OF THE PENDENCY OF THESE PROCEEDINGS AND NOT WANTING TO CREATE THE IMPRESSION WITH THE COURT THAT HE WAS DOING SOMETHING IMPROPER.

WE HAVE ALSO NOW ARGUED THAT BECAUSE THE COURT RULED THAT THE CASH THAT DR. BOHMAN HAD BEFORE THE MARRIAGE WAS CONSUMED DURING THE MARRIAGE, THAT IT MIGHT BE APPROPRIATE FOR THE COURT TO CONSIDER THE PREMARITAL PORTION OF THE B.B. RANCHERS OBLIGATION, WHICH HE COULD HAVE USED THAT CASH TO PAY IF IT HADN'T BE CONSUMED DURING THE MARRIAGE, WHICH WOULD BRING THE TOTAL OBLIGATION TO $117,098. SO THAT'S WHAT THE NATURE OF THIS ARGUMENT IS ABOUT AND THE COURT DID NOT RULE ON THIS. WHEN WE GOT YOUR RULING FROM YOU IN JUNE, I SHOULD HAVE BROUGHT IT TO YOUR ATTENTION THEN AND IN THE -- WITH THE NUMBER OF ISSUES THAT WE WERE TALKING ABOUT THAT DAY, JUST DID NOT DO SO.

THE COURT: MR. DART.

MR. DART: THIS WAS A HOTLY CONTESTED ISSUE, YOUR HONOR. AND IN FACT, BASED UPON THE MANNER IN WHICH THE COURT DEALT WITH PREMARITAL PROPERTY, IT WAS MY ASSUMPTION THE COURT HAD DENIED HIS REQUEST. THE FACT IS THAT -- AND THE COURT NEEDS TO KEEP IN MIND WE'RE NOT DEALING WITH THE FAMILY RANCH

HERE. THAT'S A DIFFERENT CORPORATION. THIS IS B.B. RANCHERS IN WHICH DR. BOHMAN, IF MY PERCENTAGES ARE RIGHT, OWNS ABOUT 98 PERCENT. AND HE PUT $300,000 INTO THIS RANCH, AND THEN HE IS -- THOSE ASSETS ARE BEING DEPRECIATED. AND ON EACH YEAR'S TAX RETURNS, THEY WOULD TAKE THE DEPRECIATION AND OFFSET IT AGAINST INCOME, WHICH INCREASED THE AMOUNT OF THEIR REFUND, WHICH GOT USED UP AND CONSUMED IN THE MARRIAGE OR REDUCED THE AMOUNT OF TAXES THAT HAD TO BE USED WITH THE MONEY GOING ELSEWHERE. AND ALL OF THIS CONTINUED THROUGHOUT THE MARRIAGE. HIS CLAIM AT TRIAL THEN CAME OUT, WELL, I TO HAVE PAY THAT BACK, THIS IS A DEBT. IF IT'S NOT A DEALT, THEN I SUBMIT THE CLAIM GOES AWAY OR -- AND BECAUSE IT'S DR. BOHMAN OWING MONEY TO DR. BOHMAN. EAST ON BOTH SIDES OF THIS TRANSACTION. HE OWNS 98 PERCENT OF B.B. RANCHERS. THE FACT IS THAT THE ONLY DOCUMENTATION OF ANY DEBT -- AND WE'RE TALKING ABOUT A METICULOUS RECORD KEEPER -- IS A LETTER THAT HE HAD RECEIVED AND HOW IT WAS GENERATED AND HOW IT CAME ABOUT, I DON'T KNOW, BUT IT'S THIS EXHIBIT 63 THAT WAS CREATED MARCH 22, 1996, WITHIN A MONTH OF TRIAL, SAYING, OH, BY THE WAY, YOU OWE B.B. RANCHERS MONEY GOING BACK SEVEN YEARS. IF YOU'LL LOOK AT THIS, THIS GOES CLEAR BACK TO 1989. IT'S A TOTAL OF ACTUALLY OF SEVEN YEARS OF TAX RETURNS, AND NOW IT'S TIME TO PAY. IN FACT, THE STATUTE OF LIMITATIONS WOULD KNOCK OUT THREE YEARS OF IT. IT WOULD KNOCK OUT THE EARLIER ONES, ONE, TWO. THE INTERESTING FACT IS DR. BOHMAN AT NO TIME UP UNTIL WE'RE IN

TRIAL EVER DOCUMENTED A CLAIM FOR AN OBLIGATION OF THIS KIND. AND IN HIS INTERROGATORY ANSWERS THAT WE'VE BEEN RELYING ON, CERTIFIED UNDER OATH WE ASKED HIM IN INTERROGATORY NUMBER 17, DO YOU HAVE ANY OUTSTANDING OBLIGATIONS, INCLUDING MORTGAGES, PROMISSORY NOTES, CREDITORS, OR PROMISSORY NOTES. IF SO, FOR EACH OBLIGATION STATE A RESPONSE YES, THE MORTGAGE ON THE HOUSE. NO CLAIM WAS -- OR NO OBLIGATION WAS ASSERTED FOR THIS NEW CLAIM TO B.B. RANCHERS, AND I SUBMIT THAT'S EVIDENCE OF AND DEMONSTRATIVE OF THE FACT THAT EVEN DR. BOHMAN DOESN'T BELIEVER THERE'S A LIABILITY THERE. IN FACT, IF YOU RECALL HIS TESTIMONY AT TRIAL, I SAID, NOW, WAIT, YOU'RE SAYING YOU OWE B.B. RANCHERS THIS MONEY. WHAT ARE THEY GIVING YOU FOR THE USE OF YOUR $300,000 OVER THE SEVEN YEARS? AND HE SAID, WELL, I'VE MEANING TO TALK TO THEM ABOUT THAT. I SUBMIT THAT THERE -- THERE'S NEVER GOING TO BE A PAYMENT MADE BY DR. BOHMAN OR IT'S GOING TO BE OFFSET AGAINST OTHER THINGS. I SUBMIT IT'S NOT A TRUE DEBT AND I SUBMIT THAT THIS BENEFIT THAT THESE PARTIES HAD ON THEIR TAX RETURNS GAVE THEM MONEY TO SPEND, TO LIVE ON, AND NOW THE DOCTOR IS ATTEMPTING TO COME AFTER THE FACT, CREATE THIS PHANTOM OBLIGATION, AND SAY BY THE WAY, I NEED TO PAY MYSELF BACK THIS MONEY THAT IS -- THAT IS -- WE UTILIZED ON OUR TAX RETURNS. THE COURT DID NOT SPEAK TO IT ONE WAY ARE THE OTHER IN THE RULING. IT WAS --

THE COURT: I REMEMBER THE ISSUE.

MR. DART: IT WAS THAT KIND OF AN ISSUE.

THE COURT: UH-HUH. IS THERE ANYTHING ELSE YOU WANT TO SAY?

MS. MAYCOCK: JUST, YOUR HONOR, THE REASON THAT THIS WAS NOT DOCUMENTED IN THE SAME WAY THAT IT MIGHT OTHERWISE BE IS BECAUSE IT WAS ALWAYS ASCERTAINABLE FROM THE TAX RETURNS. AND DR. BOHMAN TESTIFIED THAT THE UNDERSTANDING OF THE FAMILY WAS THAT HE WOULD HAVE TO PAY THIS BACK AS IT WAS SHOWN IN THE TAX SAVINGS. AND WE GOT THE ACCOUNTANTS, WE PUT THE ACCOUNTANTS TO WORK, THEY FIGURED OUT WHAT THE TAX SAVINGS WERE. AND IT'S AN OBLIGATION HE HAS TO PAY.

THE COURT: LET ME TELL YOU, AND IT WAS A HOTLY CONTESTED ISSUE AND -- AND I REMEMBER VERY WELL YOUR CROSS-EXAMINATION ATTACKING WHETHER THIS WAS JUST AN EXPEDIENCY THAT HAD BEEN CREATED. AND AT THE TIME AS I LISTENED CAREFULLY TO THE EVIDENCE, I FELT THAT THE EVIDENCE PREPONDERATED IN FAVOR OF THE OBLIGATION. I THINK IT WAS ASCERTAINABLE FROM THE TAX RETURNS. I LOOKED AT IT, THAT THIS WAS A FAMILY ARRANGEMENT AND THEREFORE, THAT THE RECORD KEEPING WAS PROBABLY LESS THAN WHAT IT SHOULD HAVE BEEN. BUT I SENSED IN LISTENING TO THE TESTIMONY THAT DR. BOHMAN WAS BEING TRUTHFUL WITH THE COURT. AND THAT WAS THE IMPRESSION I HAD, AND SO I -- IT WAS JUST ON AN ISSUE OF CREDIBILITY, AND I ACCEPTED IT. HOWEVER, I DON'T THINK THAT EVEN ON A MORAL OBLIGATION, EVEN ON A FAMILY ARRANGEMENT, THAT YOU CAN ENFORCE SOMETHING BEYOND THE STATUTE OF LIMITATIONS. SO I WILL LIMIT

IT TO THAT EXTENT.

MR. DART: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MS. MAYCOCK: YOUR HONOR, NUMBER 36, A MUCH SMALLER PROBLEM --

THE COURT: AND ONE OTHER THING THAT I WANTED TO -- WELL, NEVER MIND. I THINK I'VE PROBABLY SAID ALL I NEED TO.

MS. MAYCOCK: THE PARTIES HAD A LOAN THAT THEY MADE TO PLAINTIFF'S SON BY A PRIOR MARRIAGE IN THE AMOUNT OF $1,320. OUR POSITION WAS THAT THAT WAS A MARITAL ASSET. THE MONEY WENT TO MRS. BOHMAN, AND DR. BOHMAN FELT THAT HE SHOULD HAVE THAT AND THAT SHOULD BE COUNTED AS A MARITAL, AS HIS SHARE OF THAT.

THE COURT: THAT WAS NUMBER -- OBJECTION NUMBER WHAT?

MS. MAYCOCK: **36.**

THE COURT: **36.**

MR. DART: AND THE TESTIMONY WAS THAT THIS WAS MONEY THAT HAD COME IN AND HAD BEEN USED, AND OF COURSE THIS IS A CASE WHERE NO STONE IS LEFT UNTURNED. AND THE COURT DIDN'T -- MADE NO RULING AS TO WHETHER THAT WAS ONE OF THE MANY CREDITS THAT THE DOCTOR WAS SEEKING. THAT IT WAS -- BY THE TIME OF TRIAL, THERE REALLY WAS NO ASSET LEFT.

THE COURT: I'VE LEFT ANOTHER DOCUMENT IN ON MY DESK. EXCUSE ME FOR JUST A MINUTE.